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## A Tale of Tulips: A Counterpoint to Courts Codifying Collectibles

Hunter S. Higgins

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# A TALE OF TULIPS: A COUNTERPOINT TO COURTS CODIFYING COLLECTIBLES

HUNTER S. HIGGINS\*

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## I. INTRODUCTION

By the time the final hammer cracked against the auction house podium on May 12, 2015, eight records had been shattered and the gross domestic product (GDP) of nearly forty countries<sup>1</sup> had exchanged proverbial pockets.<sup>2</sup> In just two weeks, the auction-house duopoly of Sotheby's and Christie's had collectively sold more than \$2.5 billion worth of art and collectibles, cementing a new market peak since the 2007 economic crash.<sup>3</sup> The star of the show, Picasso's *Women of Algiers*, was purchased anonymously for a record-breaking \$179.4 million.<sup>4</sup> Yet inside the art world economy, which has been punctuated by prolific

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<sup>1</sup> *The World Factbook: Country Comparison: GDP (Purchasing Power Parity)*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Nov. 7, 2016). According to the CIA, thirty-seven countries have a GDP of less than \$2.5 billion. *Id.*

<sup>2</sup> *Picasso's Women of Algiers Smashes Auction Record*, BBC NEWS (May 12, 2015), <http://www.bbc.com/news/entertainment-arts-32700575> [hereinafter *Picasso's Women*].

<sup>3</sup> *Id.* This figure represents a twenty-five percent increase over the previous year's results. *Id.*

<sup>4</sup> *Id.* Sold to an anonymous buyer for a staggering \$179.4 million, inclusive of Christie's 12% commission. *Id.* This figure outpaces 2013's previous record-holder, *Three Studies of Lucian Freud*, which sold for \$142.4 million. *Id.*

record-breaking announcements, some are beginning to question whether “it’s easy to see this figure as the new normal”<sup>5</sup> or “easy to lose sight of where the market is really gaining and losing ground.”<sup>6</sup>

Historically, auction houses provided a niche estate service to the world’s aristocracy by facilitating the sale of their illiquid treasures and invaluable heirlooms.<sup>7</sup> Sotheby’s, Christie’s, and (to a lesser extent) Philip’s extraordinarily lucrative last decade, however, rocketed the auction house business into a multi-billion-dollar industry with revenues outpacing Hollywood.<sup>8</sup> Yet unlike the film industry’s century-old infrastructure, the rapid and somewhat random transformation of the auction industry has materialized as an unexplored frontier, leaving artists, auction houses, and bidders vying to plant a flag in the undefined and, for the moment, unencumbered landscape.<sup>9</sup> As earnest hobbyists and sincere art appreciators continue to be pushed out by investors and profiteers, auction houses have eagerly pivoted to cater to the new class of collectors interested primarily in returns that double the stock market.<sup>10</sup> With each shattered record,

<sup>5</sup> Katharine Worley & Pierre Naquin, *The 10 Most Expensive Artworks of 2015*, ARTSY (Dec. 20, 2015), <https://www.artsy.net/article/artsy-editorial-the-10-most-expensive-artworks-of-2015>.

<sup>6</sup> Katharine Worley, Clément Thibault & Pierre Naquin, *Fact-Checking the Growing Murmurs of an Impending Burst of the Art Market Bubble*, ARTSY (Feb. 4, 2016), <https://www.artsy.net/article/artsy-editorial-is-the-art-market-really-headed-for-collapse-we-took-a-look-at-the-data-to-find-out> [hereinafter Worley et al., *Fact-Checking the Growing Murmurs*].

<sup>7</sup> *Sotheby’s*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Sotheby's> (last visited Nov. 7, 2016). Both Sotheby’s and Christie’s, founded in 1744 and 1759, respectively, began by disposing of the personal library collections of notable royalty, including the collections of various British royalty, the library collections of John Wilkes, and a collection of literature Napoleon Bonaparte took with him into exile at St. Helena. *Id.*

<sup>8</sup> Mary Romano, *Christie’s, Sotheby’s Report Record Art Sales in 2014*, BLOOMBERG BUS. (Jan. 19, 2015), <http://www.bloomberg.com/news/articles/2015-01-20/christie-s-sotheby-s-report-record-art-sales-in-2014>. In 2014, Christie’s and Sotheby’s reported sales of art and collectibles of \$7.7 billion and \$6 billion respectively. *Id.* For comparison, the overall box office gross for films in 2014 was \$10.842 billion, with its two industry leaders, 20th Century Fox and Disney, responsible for only \$1.790 billion and \$1.617 billion, respectively. See *Studio Market Share*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2014&p=.htm> (last visited Nov. 7, 2016).

<sup>9</sup> Blue Chip artworks, in particular, appear to be wholly insulated from macroeconomic forces. See Worley et al., *Fact-Checking the Growing Murmurs*, *supra* note 6 (“[T]he value of masterpieces is untouched by economic fluctuations.”); see also Kelly Crow, *Global Art Free-For-All Sends Prices Soaring*, WALL ST. J. (May 14, 2015, 9:28 PM), <http://www.wsj.com/articles/art-market-sees-new-auction-highs-new-rules-1431653315> (“Masterpieces by the likes of Picasso typically sell well in any season.”) (quoting Philip Hoffman).

<sup>10</sup> *Compound Annual Growth Rate (Annualized Return)*, MONEY CHIMP, [http://www.moneychimp.com/features/market\\_cagr.htm](http://www.moneychimp.com/features/market_cagr.htm) (last visited Feb. 13, 2017). From the period of January 1, 2005, to December 31, 2015, the S&P 500 index saw an annualized return of 7.06%. *Id.* Even when accounting for the anomalous 37.22% loss in 2008 that followed the wake of the housing crisis, a 7.06% rate of return is normal, if not strong: “Over the very long run, the stock market has had an inflation-adjusted annualized return rate of between six and seven percent.” *Id.*; see also Worley et

neither veterans, newcomers, nor spectators seem immune to the voyeuristic allure, or perhaps absurdity, of \$179 million paintings that “in 10 years’ time will probably look inexpensive.”<sup>11</sup>

Amidst all the excitement, Congress and the judiciary appear equally feverish to enter the frenzy and play referee.<sup>12</sup> But as courts race to mitigate perceived injustices, the result has led to the haphazard rubberstamping of patently unconstitutional and uncommercial legal precedent.<sup>13</sup> Couched behind the public’s battle cry to preserve the cultural and social resources of art and collectibles,<sup>14</sup> a growing trend of jurisprudence appears infatuated with a well-intentioned naiveté to “cure the evils that exist in the relations between Art and Commerce.”<sup>15</sup> Yet each subsequent layer of protection is built upon diluted analysis that hinges on appealing to passions rather than measured scrutiny. And while conversations in the world of art and collectibles may inevitably drift into the emotional or abstract, the judiciary should remain grounded in reason and logic.

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al., *Fact-Checking the Growing Murmurs*, *supra* note 6 (stating that the last decade boasted “a constant rate of return for an artwork worth more than \$100,000 of 12–15%”).

<sup>11</sup> See Picasso’s Women, *supra* note 2.

<sup>12</sup> Notable Silicon Valley disrupters Uber and AirBnB have faced a litany of litigation since their inception, forcing judges and congress into defining broader concepts such as transportation and transient residence. See generally Alamea Deedee Bitran, *The Uber Innovations That Lyfted Our Standards Out of Thin Air(Bnb)*, *Because Now*, “There’s an App for That,” 8 ELON L. REV. 503 (2016).

<sup>13</sup> See *infra* notes 127–43 and accompanying text.

<sup>14</sup> See generally Jason G. Goldman, *Creativity: The Weird and Wonderful Art of Animals*, BBC (July 24, 2014), <http://www.bbc.com/future/story/20140723-are-we-the-only-creative-species> (“The question of what constitutes art, of what qualifies as creativity, is something that human culture has grappled with for generations.”). Although some creative behavior has been discovered in the mating behaviors of animals, *l’art pour l’art* (art for art’s sake) appears to be a human phenomenon. Even “[o]ne study in 2011 found that people are surprisingly good at spotting the difference between professional art and the works done by chimps and elephants, and they preferred the human paintings.” *Id.*

<sup>15</sup> William Morris, *Art and Socialism*, MARXISTS, <https://www.marxists.org/archive/morris/works/1884/as/as.htm> (last visited Nov. 19, 2016). But see Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1572 (1996).

Art has become a business, and mass market commerciality and reproduction are often its subject. This phenomenon originated with Marcel Duchamp’s ‘ready-mades’ and flourished in Pop Art, particularly Andy Warhol’s use of commercial art techniques to reproduce images of consumer society, such as his famous silkscreens of Campbell’s Soup cans and Brillo boxes. (Warhol, of course, referred to his studio as the “Factory.”)

The theme of ‘art as commerce’ recurs in the work of many contemporary artists, particularly 1980s art stars such as Jeff Koons and Ashley Bickerton. Bickerton actually sold advertising spaces on his art to stores and manufacturers. Thus, a distinction based on commercial appeal or mass market production would fail in light of contemporary art.



The goal of this Note is to educate the courts and public of the patent inconsistencies and latent implications of judicial interference in the art and collectibles market, as prosecutors, judges, and the public risk unraveling the delicate fabric of its legal and economic framework. Part II of the Note will closely examine the economics of the art and collectibles marketplace, from internal changes at the auction house to external changes in the global marketplace. In particular, the Note will examine the Asian marketplace, which has led the global expansion of art and collectibles, and the potential dangers of the class of investors it brings. This discussion will include consideration of a potential speculative bubble emerging and will provide historical patterns and lessons by which to measure the market. The concepts of behavioral finance and irrational exuberance will lead into a better understanding of where the courts are misreading the warning signs inside the current marketplace.

Part III of this Note will primarily focus on a legal critique of the failed policies enacted in response to this burgeoning multibillion-dollar industry of fine art and rare collectibles. It will discuss American intellectual property and dispel the merits of cherry-picking certain foreign intellectual property laws derived from wholly different cultural standpoints, including French moral rights.<sup>16</sup> This Note will include a comprehensive analysis of the California Resale Royalty Act (CRRA), including constitutional and economic considerations. Finally, it will address the latest arguments surrounding copyright preemption and attempt to provide guidance for the court, the public, and defense attorneys in favor of affirming the unconstitutionality of the CRRA in whole.<sup>17</sup>

Part IV of this Note will provide support for the conclusion that the judiciary should not interfere with the market. It will begin by reiterating a longstanding discussion of the difficulty in defining art, present several foreseeable implications of drafting a judicial definition, and ultimately conclude that the free market, not the court system, is best suited for resolving any perceived inequities.<sup>18</sup>

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<sup>16</sup> See *infra* Part II and accompanying notes.

<sup>17</sup> See *infra* Part III and accompanying notes.

<sup>18</sup> See *infra* Part IV and accompanying notes.

## II. CHRISTIE'S, CAPITALISM, AND THE CONSTITUTION

### A. "Price Is What You Pay; Value Is What You Get."<sup>19</sup>

It is well established in our founding documents that the United States was built upon free market principles.<sup>20</sup> It is this ideological bedrock that American jurisprudence is tasked with upholding.<sup>21</sup> Courts have a responsibility to nurture the fragile symbiosis of law and economics, mandated by decision-making that "reflect[s] a national commitment to the use of free markets to allocate resources efficiently."<sup>22</sup> Accordingly, any interference with Adam Smith's so-called "invisible hand" must contemplate and confidently outweigh the costs of the unavoidable butterfly effect it necessitates.<sup>23</sup> In the marketplace of art and collectibles, however, the judiciary's protectionist interferences have backfired, resulting in strained interpretations that run afoul of fair trade and even the Constitution.<sup>24</sup>

Part of the problem is that art and collectibles exist in an economic micro-

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<sup>19</sup> Letter from Warren E. Buffett, Chairman of the Bd., Berkshire Hathaway Inc., to S'holders (Feb. 27, 2009) (quoting Ben Graham) (internal quotations omitted) <http://www.berkshirehathaway.com/letters/2008ltr.pdf>.

<sup>20</sup> See Thomas G. West, *The Economic Principles of America's Founders: Property Rights, Free Markets, and Sound Money*, HERITAGE FOUND. (Aug. 30, 2010), <http://www.heritage.org/research/reports/2010/08/the-economic-principles-of-america-s-founders-property-rights-free-markets-and-sound-money>. Reduced to a sentence, free market principles endow a society to allocate the available scarce resources. See *id.* Contrasted from other market systems, where a centralized power, like a government body, may be tasked with determining the supply and demand of a resource, a free market transaction depends on the mutual consent of two or more individuals, relying on a bilateral pricing system, rather than unilateral determination, to undergird a given transaction. See *id.* This notion is germane to understanding the framework from which the courts are intended to operate. The judicial system's focus on justice and equity mirrors the fairness with which a free market produces the most efficient and equitable pricing of a given commodity.

<sup>21</sup> See U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> [hereinafter D.O.J.]. In 2008, the Department of Justice (DOJ) and the Federal Trade Commission published a lengthy report synthesizing a variety of discussions on the intersection of the law and economics, ultimately reinforcing a general commitment to free market principles. See *id.* The report provides an important glimpse into the government's unambiguous intent to keep the judiciary from encumbering markets with overly burdensome regulatory schemes, generally advising courts not to interfere with markets. *Id.* This mandate was levied in regards to balancing a free market approach with the reasonable regulation of monopoly powers. *Id.* Yet, even in this climate, where hyperbole and exaggerated claims of failed capitalism are particularly present, the DOJ refused to loosen its stance on interpreting public policy against a free market backdrop. *Id.*

<sup>22</sup> *Id.* at vii.

<sup>23</sup> See *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (defining "market" as "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered").

<sup>24</sup> See *infra* notes 127–43 and accompanying text.

cosm seemingly unbound by many traditional free market principles. Market participants notably resist notions of substitution,<sup>25</sup> often refusing to qualify any one-of-a-kind item as “reasonably interchangeable” with another.<sup>26</sup> Reconciling price with value in a world of nine-figure fungibles is no longer built on comparable goods, but rather on imprecise guesswork relying almost entirely on intangible factors.<sup>27</sup> Traditional valuation methodologies, therefore, are inapplicable to arts and collectibles, as each commodity is generally unique and without substitutes,<sup>28</sup> irreplaceable or impossible to reproduce, devoid of any quantifiable utility,<sup>29</sup> and largely uncertain of any anticipated returns.<sup>30</sup> Demand is hypersensitive because the frequency of auctions results in identical lots fetching different prices.<sup>31</sup> Additionally, many fail to sell at any price whatsoever,<sup>32</sup> creating a

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<sup>25</sup> See D.O.J., *supra* note 21, at 25–6 (finding that “the market is defined with regard to demand substitution, which focuses on buyers’ views of which products are acceptable substitutes or alternatives”).

<sup>26</sup> *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037 (D.C. Cir. 2008) (“Whether one product is reasonably interchangeable for another depends not only on the ease and speed with which customers can substitute it and the desirability of doing so, but also on the cost of substitution, which depends most sensitively on the price of the products.”).

<sup>27</sup> For comparison, tangible factors often provide the strongest basis for quantifying intrinsic value. In real estate, for example, appraising a house’s intrinsic value would reflect the amount of bedrooms and costs of construction more than market trends and school districts. In effect, this allows the value of real property to generally reflect tangible metrics, while the value of art and collectibles generally will not reflect such nominal expenses as the size of the work or the costs of paint used.

<sup>28</sup> The “Market Approach” values an asset relative to the sale of similar assets in similar markets. *Market Approach*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/market-approach.asp> (last visited Nov. 20, 2016).

<sup>29</sup> The “Cost Approach” is based on reasonable interchangeability and the economic principle of substitution, which looks to the costs necessary to reproduce or replace the asset with one of similar utility. *Cost Approach*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/cost-approach.asp?lgl=no-infinite> (last visited Nov. 20, 2016).

<sup>30</sup> The “Income Approach” values an asset by estimating future returns on investment. *Income Approach*, INVESTOPEDIA, <http://www.investopedia.com/terms/i/income-approach.asp> (last visited Nov. 21, 2016). At first, this may sound applicable to art and collectibles; however, this valuation strategy is typically only utilized in areas of commercial real estate, where the anticipated price of rent is stable and consistent enough to determine the value of the building. *Id.* This approach, however, may provide some ample guidance in the event that a given piece is purchased for the purposes of licensing revenue. Pamela Brown, *Definitions*, PB FINE ART APPRAISAL, LLC, <http://pbfineartappraisal.com/definitions> (last visited Apr. 20, 2017). In such a context, the estimated licensing revenue streams may provide valuable insight into valuation. See *Id.* Similarly, galleries and museums may be able to estimate the increase in attendance as a direct result of the particular item, though this too seems inherently speculative.

<sup>31</sup> See Kenny Schaccher, *The Sky Is Falling on the Art Market, or Is It?*, ART NEWSPAPER (Nov. 17, 2015), <http://theartnewspaper.com/comment/the-sky-is-falling-on-the-art-market-or-is-it/>. Wade Guyton has sold a series of nearly identical printed paintings, fetching \$2.4 million, \$3.5 million, and \$6 million. *Id.*

<sup>32</sup> Josh Spero, *Auction Houses: Art Market on the Block*, FIN. TIMES (Feb. 18, 2016),

market where “art appraisers employed by auction houses struggle to estimate value of even the most prized lots.”<sup>33</sup>

One-of-a-kind items, therefore, exist as perfectly inelastic goods in a purely competitive market.<sup>34</sup> Even the most basic economic tenets of supply and demand interact unpredictably because “[b]eing prolific doesn’t matter to the market: Mark Rothko did over 800 rectangular abstracts, but his output is definable so collectors gauge their relative rarity and bid the best versions into the tens of millions. The same can be said of Warhol, who made roughly 8,000 paintings.”<sup>35</sup> Demand is not driven by scarcity alone, but instead by “artists whose supply is widely known because it’s easier to judge which examples remain commonplace and which are rare or unique.”<sup>36</sup> Rather than rocket the price of impressionist paintings in dwindling supply, demand has shifted to other genres where supply is not limited, which provides strong evidence that the market is adapting to art’s inherent scarcity problem—at least once all of the Picasso’s are purchased—by embracing living artists.<sup>37</sup> This pricing uncertainty phenomenon, coupled with record returns, has motivated former spectators and outsiders to become participants in the hopes of cashing in on the inexplicable increases.<sup>38</sup>

### *B. Irrationally Exuberant Delusions and the Madness of Collectors*

In the early seventeenth century, the Dutch became obsessed with collect-

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<https://www.ft.com/content/99baa610-ce4e-11e5-831d-09f7778e7377>. At Sotheby’s February 3, 2016 sale, a painting by Henri Matisse sold for “£9.5m against an expectation of £12m–£18m.” *Id.* Similarly, at the Christie’s 2016 London sale, “one in four of its lots had failed to sell” and their total sales amounted to a 43.1% reduction of the previous year’s yield. *Id.*

<sup>33</sup> *Id.* (“Time and again lots were sold for below or just above their low estimates, and several failed to meet their reserve price . . .”).

<sup>34</sup> CAMPBELL R. MCCONNELL, STANLEY L. BRUE & SEAN M. FLYNN, MICROECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES 175 (19th ed. 2015) (“The high price of an antique results from strong demand and limited, highly inelastic supply . . . . For one-of-a-kind antiques, the supply is perfectly inelastic. Factors such as increased population, higher income, and greater enthusiasm for collecting antiques have increased the demand for antiques over time. Because the supply of antiques is limited and inelastic, those increases in demand have greatly boosted the prices of antiques.”).

<sup>35</sup> Kelly Crow, *Betting on a Damien Hirst Comeback*, WALL ST. J. (Sept. 17, 2015, 2:19 PM), <http://www.wsj.com/articles/betting-on-a-hirst-comeback-1442513594?tesla=y>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Indeed, while many may be able to forego a Picasso altogether, the double-edged dearth of functional substitutes poses a unique set of problems for those attempting to regulate intra-market transactions. Economically, the uniqueness and scarcity of a given art or collectible may be among the largest considerations in justifying a Picasso’s fair price. Judicially, however, the lack of available equitable remedies leaves courts struggling to assess damages or enforce specific performance.

ing tulips and their bulbs.<sup>39</sup> What originated as “proof of bad taste in any man of fortune to be without a collection of them,”<sup>40</sup> soon spread to foreigners and less sophisticated investors until “money poured into Holland from all directions.”<sup>41</sup> Enterprising profiteers created entirely new methods of investing<sup>42</sup> and began trading in speculative tulip markets.<sup>43</sup> Eventually, “people no longer bought flowers to keep them in their gardens but to sell them again at cent-per-cent profit.”<sup>44</sup> With investors willing to offer as many as twelve acres of land for a single bulb, the price of tulips no longer bore any reflection of real value, but rather suggested a speculative bubble:

The tulip-jobbers speculated in the rise and fall of the tulip stocks, and made large profits by buying when prices fell, and selling out when they rose. Many individuals grew suddenly rich. A golden bait hung temptingly out before the people, and, one after the other, they rushed to the tulip marts, like flies around a honeypot.<sup>45</sup>

Centuries later, on December 5, 1996, Alan Greenspan addressed a televised room of black-tie White House correspondents. There, he artfully denounced an unprecedented stock market surge as a speculative bubble, inflated by the “irrational exuberance” of investors rather than sound financials.<sup>46</sup> Though an immediate aftershock was felt throughout the global marketplace,<sup>47</sup> his underlying message—increasing prices reflected investors’ enthusiasm ra-

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<sup>39</sup> CHARLES MACKAY, EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS 97 (Harriman House 2003) (1841) (“As the rich Englishman boasts of his fine race-horses or his old pictures, so does the wealthy Dutchman vaunt him of his tulips.”).

<sup>40</sup> *Id.* at 89.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 94 (“The demand for tulips of a rare species increased so much in the year 1636, that regular marts for their sale were established on the Stock Exchange of Amsterdam, in Rotterdam, Harlaem, Leyden, Alkmar, Hoorn, and other towns.”).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 95.

<sup>45</sup> *Id.* at 94–95.

<sup>46</sup> See generally ROBERT SHILLER, IRRATIONAL EXUBERANCE 2 (3rd ed. 2015) (“Irrational exuberance is the psychological basis of a speculative bubble. I define a speculative bubble as a situation in which news of price increases spurs investor enthusiasm, which spreads by psychological contagion from person to person, and, in the process, amplifies stories that might justify the price increase and brings in a larger and larger class of investors, who, despite doubts about the real value of the investment, are drawn to it partly through envy of others’ successes and partly through a gambler’s excitement.”).

<sup>47</sup> *Id.* at 1 (“As soon as he uttered these words, stock markets dropped precipitously. In Japan, the Nikkei index dropped 3.2%; in Hong Kong, the Hang Seng dropped 2.9%; and in Germany, the DAX dropped 4%. In London, the FTSE 100 was down 4% at one point during the day, and in the United States, the next morning, the Dow Jones Industrial Average was down 2.3% near the beginning of trading.”).

ther than real value<sup>48</sup>—was largely ignored until the market collapsed some four years later.<sup>49</sup> Around that time, irrational exuberance emerged elsewhere in the economy, as prices in the housing market similarly ballooned from a speculative bubble.<sup>50</sup> Real estate had become the latest example of a behavioral finance investment strategy untethered from free market principles.<sup>51</sup> As prices diverged from real value, the speculative housing bubble popped a mere eight years following the stock market.<sup>52</sup>

### *C. Speculating About a Speculative Bubble*

Today's less cautious and more enterprising investors have begun using the auction house as a veritable bookie, placing highly speculative wagers not on tulips, technology stocks, or title to land, but on Picasso, Porsche,<sup>53</sup> Pinot Noir,<sup>54</sup> and Patek Philippe.<sup>55</sup> As a result, many of the familiar precipitating factors and patterns of a speculative bubble have emerged inside the auction house.<sup>56</sup> Spec-

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<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 33–36. In part because no high-quality home price index existed until 2000, a lack of public information about prices led to financial institutions lending to unqualified borrowers with poor credit histories. *Id.*

<sup>51</sup> *Id.* at 61 (“Paradoxically, the fears that drove people to look to investments for security in an increasingly capitalist economy may actually have lowered the personal savings rate, since the demand-induced increase in the price of their investments may have given them an illusion that they were saving through the appreciation of their assets.”).

<sup>52</sup> *Id.* at 20 (“The upswing in home prices during 1998–2006 . . . may be regarded as its ultimate cause. Real home prices for the United States as a whole increased 85% between 1997 and 2006 . . . . This is nothing like the tripling of the stock market between 1995 and 2000, but, when viewed in comparison with long-run historical patterns in home prices, it is still striking.”).

<sup>53</sup> In 2015, a Porsche 962, used in competition from 1990–1993, sold online for \$1.6 million, setting a record for the most expensive lot ever sold online. See Henri Neuendorf, *Bonhams Breaks Online Sale Record with \$1.6 Million Porsche 962*, ARTNET NEWS (May 28, 2015), <https://news.artnet.com/market/bonhams-record-online-porsche-302485>.

<sup>54</sup> In 2014, Sotheby's sold 114 bottles of Pinot Noir from renowned Romanée-Conti for \$1.6 million, the most expensive lot of wine ever. See *Hong Kong Auction Breaks Record for Most Expensive Wine*, GUARDIAN (Oct. 5, 2014), <http://www.theguardian.com/lifeandstyle/2014/oct/05/hong-kong-auction-breaks-record-expensive-wine>.

<sup>55</sup> In 2015, a one-of-a-kind Patek Philippe 5016A grand complication, sold at auction for a record price of \$7.3 million. Arthur Touchot, *Record-Breaker: Unique Patek Philippe Raises \$7.3 Million for Muscular Dystrophy Research*, HAUTE TIME (Nov. 7, 2015), <http://www.hautetime.com/record-breaker-unique-patek-philippe-raises-7-3-million-for-muscular-dystrophy-research/71139/>.

<sup>56</sup> See generally SHILLER, *supra* note 46, at 40–60. Shiller lists twelve precipitating factors that account for the boom including broad sweeping macroeconomic considerations like “cultural and political changes favoring business success” and “The Ownership Society” to more quantifiable circumstances like “Supportive Monetary Policy” and “A Republican Congress and Capital Gains Tax Cuts.” *Id.*

ulation trading, in turn, has emerged in both downstream and global marketplaces, leading auction houses to pivot their business models in the wake of these new customers.<sup>57</sup> Leading the charge in both categories, Chinese bidders “accounted for 27.3 percent of global art transactions in 2014 . . . compared with just 0.2 percent in 2000.”<sup>58</sup> As in Tulip Mania, foreigners more interested in a quick profit than sincere art appreciation have subsequently driven the price of lots that are “easy to understand, and therefore appreciate.”<sup>59</sup> This artistic illiteracy is worn as a badge of imperialism. Following the purchase of a Modigliani painting for \$170.4 million, Chinese billionaire Liu Yiqian stated, “[t]he message to the West is clear: We have bought their buildings, we have bought their companies, and now we are going to buy their art.”<sup>60</sup> Yet, unlike real estate, art and collectibles are movable goods, and a massive relocation of the commodities abroad will similarly source economic and legal dominion offshore.

Similar to the criticized pork-barrel spending in American Congress, “[t]he Chinese government wants to promote culture, so developers may include a museum in a proposal to increase its chances of approval.”<sup>61</sup> As a push back to the nationalization of art and collectibles,<sup>62</sup> ultra-high net worth Asian collec-

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<sup>57</sup> Crow, *supra* note 9 (“[T]he international art market is seeing seismic shifts in the way it behaves, according to longtime dealers and auction executives. Gone, for example, are the days when collectors in Europe and the U.S. dictated tastes and drove prices. Today’s art market is being steered by a bigger and more geographically diverse pool of collectors than the blue-chip buyers of a generation ago.”).

<sup>58</sup> Conrad De Aenlle, *Sotheby’s and Christie’s Adapt to Digital Age*, N.Y. TIMES (Mar. 11, 2016), [http://www.nytimes.com/2016/03/12/arts/international/sothebys-and-christies-adapt-to-digital-age.html?\\_r=0](http://www.nytimes.com/2016/03/12/arts/international/sothebys-and-christies-adapt-to-digital-age.html?_r=0); Kelly Crow, *Christie’s Results May Show Slowing in Art Sales*, WALL ST. J. (July 20, 2015), <http://www.wsj.com/articles/christies-results-may-show-slowing-in-art-sales-1437422461> (“Christie’s sales of Asian art also grew 25%, to \$461.4 million, compared with a year ago . . . . [T]he house owes much of its success in the category to a consignment of coveted pieces from the estate of Asian art dealer Robert Hatfield Ellsworth that drew bidders despite China’s volatile stock market.”); Crow, *supra* note 9 (“David Norman, a four-decade veteran specialist at Sotheby’s, said a handful of Asian collectors—including Chinese movie mogul Wang Zhongjun and business tycoon Wang Jianlin—accounted for a third of the spending at his house’s \$368 million Impressionist and modern art sale on May 5.”).

<sup>59</sup> Kelly Crow, *Bill Koch Wants to Sell a Pair of Blue-Chip Paintings*, WALL ST. J. (Oct. 8, 2015), <http://www.wsj.com/articles/bill-koch-wants-to-sell-a-pair-of-blue-chip-paintings-1444348801?tesla=y> (“Unlike early Picasso, prices for Monets have surged over the past decade, fueled by an increasingly international pool of new bidders who have gravitated to the artist. That’s in part because it’s easy to understand, and therefore appreciate, the Impressionist’s experiments in capturing the rippling light and shadows coursing over the pond of his Giverny, France, garden.”).

<sup>60</sup> *Could a Rise in Chinese Billionaires Give Sotheby’s A Lift?*, SEEKING ALPHA (Jan. 20, 2016), <http://seekingalpha.com/article/3821146-rise-chinese-billionaires-give-sothebys-lift>.

<sup>61</sup> Fiammetta Rocco, *The Modern Medicis*, ECONOMIST 1843, Apr. 2016, at 24, <https://www.1843magazine.com/culture/the-modern-medicis>.

<sup>62</sup> The People’s Republic of China attempted to nationalize an auction house by creating P, a government run auction house. See generally Cain Nunns, *China’s Government-Run Auction House*

tors have begun opening private museums across the world to house and monetize vast collections.<sup>63</sup> “[S]ince 2000, more than 225 private museums of contemporary art have opened across the world,” driven largely by the growth in number of wealthy people with an interest in contemporary art.<sup>64</sup> China faces a broad array of global competitors,<sup>65</sup> as “[e]merging-market governments tend to focus their educational spending on schools, leaving museums to the private sector.”<sup>66</sup> In Europe, many of the new private museums were created “to fill the cultural vacuum that followed the collapse of the Soviet Union.”<sup>67</sup>

As the finite supply of art dwindles, irrationally exuberant Chinese investors have begun pouring money into wine.<sup>68</sup> Chinese investors began bidding bottles of Chateau Lafite Rothschild into “stratospheric heights after deciding, for still-obscure reasons, that Lafite[,] and only Lafite[,] made for an impressive gift—perhaps because its name was easy to pronounce in Mandarin, or because the estate had stuck the character for the lucky number eight on the label of its 2008 vintage.”<sup>69</sup> Similar to art, the runaway prices of wine soon led the entrepreneurial industry to alter their business models.<sup>70</sup> Vendors began focusing on “upper-middle-class professionals [rather] than . . . the private-jet set”<sup>71</sup> and selling wines as “prearrivals” in which the store collected payment before securing physical possession of the bottles.<sup>72</sup> What first provided a means for new customers to receive “good wines at the right price” soon turned acerbic, after a dozen people who were “feeling insecure” filed lawsuits after the waiting period, unfamiliar with the patience demanded of fermentation.<sup>73</sup> Similar to tulip-

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*Is Unstoppable*, BUSINESS INSIDER (Mar. 2, 2013), <http://www.businessinsider.com.au/china-party-run-auction-house-success-2013-2>.

<sup>63</sup> Rocco, *supra* note 61, at 23.

<sup>64</sup> *Id.*

<sup>65</sup> Crow, *supra* note 9 (“So while the Chinese are surging now, they face a broad array of competitors from New York, Malaysia, Mexico City and the Middle East.”).

<sup>66</sup> Rocco, *supra* note 61, at 23–24.

<sup>67</sup> *Id.* at 24.

<sup>68</sup> See Dan Rosenheck, *The Fine Wine Drain*, ECONOMIST 1843, Apr./May, 2016, at 70 <https://www.1843magazine.com/features/the-fine-wine-drain>.

<sup>69</sup> *Id.* (“Unfortunately, 2011 marked the peak of the Asian Lafite frenzy, with a half-decent vintage commanding \$1,000 a bottle. There was no way a twenty-something journalist could justify dropping a G on grape juice . . .”). The article, written from the author’s own experience losing substantial sums of money on wine trading, particularly echoes the sentiment of art and collectibles mania, stating: “Rather than vowing not to throw good money after bad, I felt like a poker player (another of my vices) who has bet so much on a hand that he is mathematically ‘committed’ to the pot . . . . Before long, my ‘calculated risk’ became desperate rationalization.” *Id.* at 72.

<sup>70</sup> See *id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



mania, the irrationally exuberant market drove many in over their heads, with individuals taking out second mortgages in order to place \$50,000 bets on flipping “grape juice.”<sup>74</sup>

In reaction to these changing consumer demographics and behaviors, dramatic changes have taken place internally at the auction houses.<sup>75</sup> “[A]s art values skyrocket, fierce competition is driving auction-house owners and shareholders to demand new leaders” with each of the three major auction houses hiring new chief executive officers in 2015 “to enact changes that could reshape their houses.”<sup>76</sup> Already, both Sotheby’s and Christie’s have begun to euphemistically respond to “collectors’ blended shopping sensibilities”<sup>77</sup> by “combining different genres of art, such as Impressionism and Postwar Contemporary, and bunching sales together on the calendar.”<sup>78</sup> These moves are presented as a “means of catering to clients with eclectic tastes, but they also may reduce costs.”<sup>79</sup> The shifting emphasis from art to business is likely a direct response to the influx of business savvy collectors who demand a greater share of auction house commissions, or to sell their art risk-free through guarantees, whereby the auction house or outside investors pledge to buy a work if bidders demur.<sup>80</sup> This places auction houses at risk, should the bubble burst. Accordingly, not all staples of the art economy are thrilled with the new wave of art economics; auction house icons are leaving.<sup>81</sup> Directly or indirectly, the auction house establishment is being ousted by these new changes, demonstrated by Sotheby’s five per-

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<sup>74</sup> *Id.*

<sup>75</sup> Crow, *supra* note 9 (“Lately, these new global buyers have been joined by an influx of investors eager to store more of their cash in art—particularly now that interest rates remain low. And unlike the old days, when serious collectors typically clung to pieces over the long term, many buyers have become comfortable trading artists often to reap tidy profits.”).

<sup>76</sup> *Id.* (“Turnover at the top is rare within the clubby auction industry, but as art values skyrocket, fierce competition is driving auction-house owners and shareholders to demand new leaders.”).

<sup>77</sup> *Id.* (“All three executives are beginning to enact changes that could reshape their houses and will likely ripple out into the art market beyond. Ms. Barbizet said she wants Christie’s to offer more sales that mix objects from different eras like the \$706 million ‘Looking Forward to the Past’ sale Christie’s held in May. The event combined impressionist, modern and contemporary pieces in a single sale that she said echoes collectors’ blended shopping sensibilities. ‘The new collectors are crossing categories,’ she said, ‘and our job is to encourage that.’”).

<sup>78</sup> De Aenlle, *supra* note 58.

<sup>79</sup> *Id.*

<sup>80</sup> Kelly Crow, *Meet the Art World’s New Leaders*, WALL ST. J. (July 2, 2015, 11:23 AM), <http://www.wsj.com/articles/meet-the-art-worlds-new-leaders-1435850538?tesla=y>.

<sup>81</sup> See Henri Neuendorf, *Sotheby’s European Chairman Melanie Clore to Step Down*, ARTNET NEWS (Feb. 15, 2016), <https://news.artnet.com/people/sothebys-melanie-clore-resigns-427364> (noting that Melanie Clore resigned following AAP acquisition announcement and was replaced with the AAP merger heads).

cent staff reduction, including the loss of the Impressionist and Modern department's co-head, as a result of strategic acquisitions.<sup>82</sup>

Technological changes have ignited the auction house revolution.<sup>83</sup> Suzanne Gyorgy, global head of art advisory and finance at Citi Private Bank summarized the impact of the technological changes as follows: "Businesses need to evolve, and although the auction process has been around close to forever, the technology changes things; the way the market works changes things, and so does the global nature of the market . . . ."<sup>84</sup> Moreover, as bidders changed from collectors to investors, online sales of art and collectibles reached nearly \$3.6 billion in 2014, a 32% increase from the previous year, with insiders estimating growth of 25% per year over the next decade.<sup>85</sup> In 2015, Christie's held seventy-nine sales on an online auction platform and acquired Collectrium, a digital art collection management service.<sup>86</sup> Sotheby's began streaming its auctions live on eBay and acquired Art Agency Partners, a service that advises collectors on legal and investment matters.<sup>87</sup> Globally, Christie's opened offices in Shanghai and Mumbai as collectors from China and India, areas that have introduced both "tremendous growth" and "volatility and consternation," increasingly make up larger segments of the global art market.<sup>88</sup> China makes up more than a quarter of global sales, so the dwindling period of its catch-up growth "could subtract up to a third from the annual growth of the global market."<sup>89</sup> Internally, both Sotheby's and Christie's are experimenting with their business models, "combining different genres of art, such as Impressionism and Postwar Contemporary, and bunching sales together on the calendar. They present the moves as a means of catering to clients with eclectic tastes, but they also may

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<sup>82</sup> Spero, *supra* note 32.

<sup>83</sup> Ellen Gamerman, *The Art of the Tablet*, WALL ST. J. (Mar. 9, 2012, 7:08 PM), <http://www.wsj.com/articles/SB10001424052970203370604577265870880589082> ("Digital tools are changing the way that art is bought, sold[,] and simply looked at. Collectors who once traveled across the world to art fairs and auctions are buying more works without seeing them in person, relying instead on digital views . . . . Officials at Christie's and Sotheby's say they're seeing more iPads and other devices filling the room during sales. Christie's, which already offers absentee bidding via its website, expects to extend absentee bidding to its iPad app next month, along with new features like access to condition reports on works. Sotheby's just updated its iPad catalog app to allow collectors to take notes in digital catalogs during sales."); *see also* De Aenlle, *supra* note 58 ("New digital technology and new customers with new attitudes in new places, along with new competition from deft and nimble upstarts eager to cater to them, have forced the dominant companies, Sotheby's and Christie's, to develop new ways to do business.").

<sup>84</sup> *See* De Aenlle, *supra* note 58.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

reduce costs.”<sup>90</sup> As the number of buyers continue to increase, auction houses “may embrace the distinctions between market segments even further: providing a premium service for high-end collectors centered on a few evening sales while using extensive online abilities to grant greater access to the market, with fewer frills, to a growing number of customers with thinner wallets.”<sup>91</sup>

*D. Out with the Old, in with the New*

The year 2015 saw a number of record-breaking prices.<sup>92</sup> Eight of the top ten most expensive lots sold accounted for nearly \$850 million and were brokered through Christie’s.<sup>93</sup> Sotheby’s, despite having only two works enter the year’s top ten, still managed to bring in more than \$5 billion in 2015. With art’s high barrier to entry, some investors have redirected their focus into these non-art “blue chip” collectibles, and new divisions and acquisitions at auction houses now exist to accommodate the frenzied marketplace.<sup>94</sup> Though the definition may seem obvious,<sup>95</sup> the term “collectible” has a particularized definition in the Internal Revenue Code, including: any work of art, rug, antique, metal, gem, stamp, coin, alcoholic beverage, or any other tangible personal property specified by the Secretary.<sup>96</sup> Notably left out of this code, vintage automobiles and watches account for an increasingly larger share of the auction house revenues. In fact, indices are maintained on the prices of cars at auction, including the *Hagerty Blue Chip Index* of collector’s cars, reflecting 48% annual growth from \$1.4 million to \$3.4 million in the past five years.<sup>97</sup> Similarly, the *Hagerty Index*

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See Kelly Crow, *Christie’s Sells Rothko for \$82 Million on Way to Record Sales Week*, WALL ST. J. (May 14, 2015), <http://www.wsj.com/articles/christies-sells-rothko-for-82-million-on-way-to-record-sales-week-1431572868?tesla=y> (“The total underscores how confident collectors are about the trajectory of art values and their eagerness to join in no matter how high prices climb.”).

<sup>93</sup> Katharine Worley & Pierre Naquin, *The 10 Most Expensive Artworks of 2015*, ARTSY (Dec. 20, 2015), <https://www.artsy.net/article/artsy-editorial-the-10-most-expensive-artworks-of-2015>. These works were sold during the same week in May, allowing Christie’s to break a record as well: “[T]he first ever \$1 billion week by a single auction house.” *Id.*

<sup>94</sup> *Market Trends*, HAGERTY, <https://www.hagerty.ca/valuationtools/market-trends> (last visited Nov. 5, 2016). Since the earliest days of the stock market, the term “Blue Chip,” originally referring to the highest value chip at a casino, has since become a reference to the most stable and consistent stocks. *Id.*

<sup>95</sup> See MACKAY, *supra* note 39, at 97 (“As the rich Englishman boasts of his fine race-horses or his old pictures, so does the wealthy Dutchman vaunt him of his tulips.”); see also Crow, *supra* note 59 (“Oil-refining billionaire and investor Bill Koch has spent decades amassing an eclectic collection of rare wine, Western art[,] and trophy paintings.”).

<sup>96</sup> 26 U.S.C.A. § 408 (West 2015).

<sup>97</sup> *Blue Chip: Index of the Automotive A-List*, HAGERTY, <https://www.hagerty.ca/apps/valuation>

of *Affordable Classics*,<sup>98</sup> made up of automobiles priced under \$30,000, yielded nearly an identical return in a third of the time, likely a result of the influx of inexperienced investors.<sup>99</sup>

### III. THERE'S A FROG IN MY THROAT

In 1857, just shortly after then-unknown French artist Jean-Francois Millet put the finishing brush strokes on his latest commissioned work, *The Angelus*, the buyer reneged on his commitment to purchase the composition, which forced Millet to sell the it for a nominal sum before his death in 1875.<sup>100</sup> Within a decade of his passing, *The Angelus* received an unlikely endorsement from renowned artist Salvador Dalí, sparking a bidding war for the painting, which ultimately sold to the Louvre, by some accounts, for 1,000,000 francs.<sup>101</sup> According to folklore, as the million-franc transaction was taking place, Millet's poverty-stricken granddaughter had resorted to peddling flowers—unfortunately not seventeenth century tulips—in the Parisian streets across town to make ends meet.<sup>102</sup> Years later, when the painting sold again for another sizeable profit, Millet's heirs shared in none of the gain and French courts had enough.<sup>103</sup> By 1921, France introduced a new intellectual property concept to address the publicly perceived pandemic of starving artists.

The concept and even name—"droit de suite," translating roughly to "art proceeds right"<sup>104</sup>—were simplistically noble: an artist should be "entitled to a portion of the proceeds from a subsequent resale of the painting after it has

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tools/market-trends/collector-indexes/Blue Chip (last visited Feb. 18, 2017) ("The Hagerty 'Blue Chip' Index of the Automotive A-List is a stock market style index that averages the values of 25 of the most sought-after collectible automobiles of the post-war era.").

<sup>98</sup> The Hagerty Price Guide Index of Affordable Classics is a stock market style index that averages the values of 12 undervalued cars, priced under \$30,000, from the 1950s–70s. *Id.* ("The list to the left shows the cars that make up the index, while the graph above shows this index's average value over the past five years. Values are for #2 condition, or 'excellent' cars.").

<sup>99</sup> *Id.*

<sup>100</sup> Mary Gwyn Bowen, *The Case of the Destitute Granddaughter*, PAINTING PUNDIT (Dec. 4, 2013), <http://paintingpundit.com/tag/millet/>.

<sup>101</sup> U.S. Copyright Office, *Droit De Suite: The Artist's Resale Royalty* (Dec. 1, 1992), 155 n.98 [hereinafter *Droit De Suite*].

<sup>102</sup> *Id.* ("In almost every discussion of this subject the story of the sale of Millet's *Angelus* for 1,000,000 francs while his granddaughter sold flowers in the streets is recounted. The drawing of Forain, depicting two children in rags observing the sale of a painting for 100,000 francs and saying: 'Look, one of papa's paintings,' is constantly described.").

<sup>103</sup> Jay B. Johnson, *Copyright: Droit De Suite: An Artist Is Entitled to Royalties Even After He's Sold His Soul to the Devil*, 45 OKLA. L. REV. 493, 503 (1992).

<sup>104</sup> *Id.*

greatly increased in value.”<sup>105</sup> This entitlement, however, broadened the already abstract protectionism of *droit moral*, or “moral rights,” by integrating a commercial layer.<sup>106</sup> *Droit moral* was France’s prevailing legal theory that held out “works of art” as embodiments of an “individual[’s] essence of being,” which, it was argued, were axiomatically more valuable than “routine physical labor.”<sup>107</sup> These moral rights attached “to the personality and reputation of the creator and remain[ed] with him even after he ha[d] sold his work.”<sup>108</sup> France invented and then vested these moral rights in artists to “preserve the bond between the artist and her work.”<sup>109</sup> Commerce, however, pays little mind to the endless academic and philosophical debates of morality and art, and the economic realities of *droit de suite* merely promoted a localized anti-commercial climate. Rather than protecting artists, to date, the “notable effect of French *droit de suite* has enhanced the auction center status of London at the expense of the Paris art market.”<sup>110</sup>

On the other hand, the national lens of American intellectual property is deliberately narrower than the kaleidoscopic aims of *droit de suite* and *droit moral*.<sup>111</sup> Copyright law provides significant legal protection, which endows artists with a bundle of rights, which fundamentally focus on preserving commercial viability rather than morality.<sup>112</sup> For years, this intent remained with later additions to copyright law,<sup>113</sup> yet more recently, some states have begun wavering from this position by transplanting foreign intellectual property concepts. California, for instance, codified a derivative of the French moral right of integ-

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 508 n.114 (“*Droit Moral* consists of a package of rights including the rights of paternity, integrity, and divulgation. These rights attach to the personality and reputation of the creator and remain with him even after he has sold his work. The right of paternity is the right of the creator to lay claim to a work, require others to recognize him as the creator, and prevent others from attributing to him work, which he has not created. The right of integrity is the right of the creator to prevent his work from being mutilated. And, the right of divulgation is the right of disclosure.”) (internal citations omitted).

<sup>107</sup> Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1542 (1989) (“[W]orks of art are created through a person’s mental labor and thus embody more of her individual essence of being than works created through routine physical labor.”).

<sup>108</sup> See Johnson, *supra* note 103, at 508 n.114.

<sup>109</sup> See Lacey, *supra* note 107, at 1537.

<sup>110</sup> Jennifer R. Clarke, *The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law*, 81 COLUM. L. REV. 1315, 1332 (1981).

<sup>111</sup> Letter from Tod Cohen, Vice President, Assoc. Gen. Counsel of eBay Inc., to Karyn Temple Claggett, Senior Counsel for Policy and Int’l Affairs, (Dec. 5, 2012) (on file with U.S. Copyright Office, Library of Congress) (arguing that “*droit de suite* is a foreign concept born of different social and legal systems.”).

<sup>112</sup> See generally 17 U.S.C. § 106 (2012).

<sup>113</sup> See 17 U.S.C. § 109 (2012). Concepts such as the “first sale doctrine” were later added to redress the unfair exploitation of unpublished works. *Id.*

rity to prohibit the intentional destruction of artwork.<sup>114</sup> At first glance, the statute appears objectively reasonable; few rational people would likely defend the intentional destruction of fine art, even if it meant surrendering some First Amendment rights of symbolic speech. As adopted, however, the statutory language grossly overreached this goal by preventing owners from making *any* “alteration” to fine art they own, no matter how innocuous.<sup>115</sup> However unlikely the foreseeable enforcement of such trivial offenses to one’s artworks, the statute evidences the overall incongruent juxtaposition of foreign moral rights in American law and economics.<sup>116</sup>

Nevertheless, in 1976 a modified concept of *droit de suite* reached America in the form of The California Resale Royalty Act.<sup>117</sup> Based on the only empirical study at the time, the legislature pushed through the *droit de suite* variant—notably stronger than France’s—in spite of the study’s position that “the problem of artist[s] selling their works for nearly nothing only to have them resold later at fabulous prices is exaggerated.”<sup>118</sup> The CRRA required the seller of fine art to pay the original artist five percent of the proceeds, if the work was sold in California or the artist seller resided there.<sup>119</sup> The seller was given ninety

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<sup>114</sup> See Cal. Civ. Code § 987(c)(1) (West 2016) (“No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.”); see also 17 U.S.C. § 106A (2012) (outlining federal moral rights of artists to “attribution and integrity”).

<sup>115</sup> *Id.* “Any . . . alteration” might include replacing a frame to better compliment the bedroom’s aesthetic, installing a concealed wire to allow the work to be hung, or engaging a professional treatment service to remove dust and natural damage or otherwise restore the painting. *Id.* Worse yet, consider the implication of adopting the moral “right of retraction,” which allows an artist to withdraw or modify previously relinquished work. What impact might rendering every transaction voidable by the artist have on the industry at large?

<sup>116</sup> *Id.* Consider the striking similarities to moral rights within the statute’s language:

The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist’s personality, is detrimental to the artist’s reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction . . . .

*Id.*

<sup>117</sup> See Johnson, *supra* note 103, at 493 n.7 (“The resale royalty concept was apparently first introduced in the United States in a contractual setting in 1948 when artist Grant Wood vowed that sales of his works would include a stipulation that he would receive half of the profits each time the work was resold. This action was in response to the resale of his painting, *Daughters of the American Revolution*, for four times the initial purchase price.”).

<sup>118</sup> Tom R. Camp, *Art Resale Rights and the Art Resale Market*, 28 BULL. COPYRIGHT SOC’Y 146, 151 (1980); see also Thomas M. Goetzel & Stuart A. Sutton, *Copyright and the Visual Artist’s Display Right: A New Doctrinal Analysis*, 9 COLUM. J. ART & L. 15, 41 (1984); *Droit De Suite*, *supra* note 101, at 155 n.98.

<sup>119</sup> See Cal. Civ. Code § 986(a) (West 2015), *invalidated by* *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015).

days to remit funds to the artist or transfer the money to the state run California Arts Council.<sup>120</sup> If after seven years the Arts Council was unable to locate the artist, the funds would escheat to the state for the ironic purpose of “acquiring fine art.”<sup>121</sup> In effect, the CRRA provided the government with a risk-free back-door into the art and collectibles market, authorizing California to benefit from the speculative bubble by seizing portions of out-of-state profits through escheat or taxes.

The issues undergirding the CRRA first came to light in 2011, when Christie’s, Sotheby’s, and eBay were sued in federal court for failure to remit payment under the CRRA.<sup>122</sup> At the district court, the auction houses argued successfully that the CRRA violated the Constitution’s dormant Commerce Clause<sup>123</sup> by regulating sales occurring outside of California.<sup>124</sup> There, the court struck down the CRRA, finding that works of fine art constituted a “thing” in interstate commerce and any statute enforcing “economic regulation” of sales occurring outside the state violated the Constitution.<sup>125</sup> On appeal, however, the Ninth Circuit only affirmed the district court’s decision in part, electing to sever the unconstitutional aspects and continue to permit CRRA regulation in California.<sup>126</sup> But where the majority’s analysis narrowly focuses on the dormant Commerce Clause at issue, it is the subsequent en banc opinion that jeopardizes the future of the art and collectibles market.<sup>127</sup>

Penned by Judge Reinhardt, the dissent dismisses the district court’s findings in favor of grandiose emotional appeals, mirroring public opinion’s propensity to negate facts for narrative. Despite his unsupported assertion that the CRRA “secured invaluable benefits for talented artists,” district court’s fact-finding revealed enforcement of the CRRA was “spotty” and marked with decades of bureaucratic inefficiencies and mismanaged funds.<sup>128</sup> The en banc Ninth

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<sup>120</sup> *Id.* § 986(a)(2).

<sup>121</sup> *Id.* § 986(a)(5).

<sup>122</sup> See *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 795 (2016). In the lawsuit of Sam Francis Foundation and others against Christie’s, Sotheby’s, and eBay for failure to pay royalties under the CRRA, the Ninth Circuit held that the offending portion of the Act can be severed and found the CRRA constitutional for in-state re-sales but unconstitutional for out of state sales based on the dormant Commerce Clause theory. *Id.*

<sup>123</sup> Under the dormant Commerce Clause, states are prohibited from unjustifiably burdening interstate flow of commerce. See U.S. CONST. art. 1, § 8, cl. 3.

<sup>124</sup> *Sam Francis Found.*, 784 F.3d at 1322–23.

<sup>125</sup> *Estate of Graham v. Sotheby’s Inc.*, 860 F. Supp. 2d 1117, 1123–24 (C.D. Cal. 2012); see also *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

<sup>126</sup> *Sam Francis Found.*, 784 F.3d at 1326.

<sup>127</sup> See *id.* at 1326–34.

<sup>128</sup> *Id.* at 1326.

Circuit eagerly celebrated the nominal benefit of a law that brought artists an average one-time payment of \$820,<sup>129</sup> all while readily dismissing evidence that the CRRA “harmed California’s art market.”<sup>130</sup>

The cost of implementing the losing all auction house allowing the false narrative remediating the starving artist perception, marginalizing the opinions and evidence and underscoring the court’s general misunderstanding of the recent changes to the auction houses.

Yet, in the court’s haste to regulate the speculative bubble, it risked unraveling the industry’s fibers altogether. Unable to cite evidence of the CRRA’s effectiveness, Reinhardt justifies its existence by marginalizing those adversely affected by it as a “minor regulation” affecting only “a small number of wealthy Californians.”<sup>131</sup> Not only does this sentiment fail to acknowledge the growing accessibility of art and collectibles, but tonally, the court’s voice bears more resemblance to a protestor than that of an Appellate Judge. Even Judge Reinhardt’s summary of the CRRA harkens the type of exaggerated demagoguery that led French courts to adopt moral rights behind the unsupported starving artist narrative:

Under the Act, when a wealthy collector of modern art purchases for several million dollars a work of art that the prior owner bought for a minimal amount from a then-unknown young artist, the now-well-known artist will for the first time receive a measure of reasonable compensation for the art that he created.<sup>132</sup>

After targeting “wealthy Californians” without compelling reason, Reinhardt then turns his analysis towards corporations, insinuating that Christie’s and Sotheby’s, merely “hav[ing] the resources necessary to locate artists all over the world,” should in addition to the five percent royalty, be burdened with the costs of doing so.<sup>133</sup> After all, Reinhardt dissented from the majority to arbitrarily de-

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<sup>129</sup> U.S. COPYRIGHT OFF., *RESALE ROYALTIES: AN UPDATED ANALYSIS* 22 (2013) [hereinafter *RESALE ROYALTIES*] (“The district court in *Estate of Graham* cited a 2011 New York Times piece, which found that in the thirty-four years since the enactment of the CRRA, only 400 artists had received a royalty, for a total of \$328,000.”).

<sup>130</sup> *Id.* (“Sotheby’s and Christie’s point to Sotheby’s decision to cease holding contemporary art auctions in Los Angeles shortly after the royalty was enacted as evidence that the CRRA has harmed California’s art market”).

<sup>131</sup> *Sam Francis Found.*, 784 F.3d at 1328. In the footnote to this opinion, Judge Reinhardt continues, “I disagree with the majority’s view that requiring wealthy art owners to remit a five-percent royalty payment from profitable art sales to the artists of the works sold is more than ‘minor’ . . . .” *Id.* at 1328 n.5.

<sup>132</sup> *Id.* at 1326–27. The court also noted that, “[o]f course, the compensation the artist receives is by no means excessive.” *Id.* at 1327 n.2.

<sup>133</sup> *Id.* at 1332.



termine a five percent royalty “is by no means excessive.”<sup>134</sup> The economic reality of an auction house assuming these costs, however, is far from “minor” and could yield nearly fifty percent net decrease in sales revenue.<sup>135</sup>

Perhaps the most egregious aspect of the CRRA, is the clear conflict of interest vested in the state run Arts Council,<sup>136</sup> which “currently is holding royalties for ninety-eight artists or estates.”<sup>137</sup> This conflict is particularly pronounced where funds may be effectively withheld on such thin and vague grounds as “due to difficulty in communicating with the artist or their estate.”<sup>138</sup> Nevertheless, this legitimate concern was ignored and ultimately dismissed by the court, assuring the public that “[i]t matters not that, in some circumstances, the royalty amount eventually may wind up, through a form of escheat, in a special fund of the State’s coffers.”<sup>139</sup>

To that end, Judge Reinhardt and California’s courts appear to have abandoned their obligation to free market principles, promoting statutory interpretation “characterized [by a] ‘fervor’ for [a moral] right as a ‘deep-seated romantic view of art’ and of the artist starving,”<sup>140</sup> even when such realities don not exist. For nearly forty years, the CRRA was based on a “court’s willingness to incorporate the concept of moral rights” or “whether the judge accepts the ‘personal-

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<sup>134</sup> *Id.* at 1327 n.2.

<sup>135</sup> Admittedly, this figure assumes a worst-case scenario whereby the entirety of the CRRA costs would be borne by the auction house. Even still, it is foreseeable that sellers might demand the 5% royalty come solely from the auction house’s 12% commission, perhaps contemplated as a condition of the seller’s agreement with an auction house. To do so would reduce an auction house’s commission margin to 7%, amounting to a 42% decrease in net revenue. Then, by shifting the costs required to search, authenticate, and securely transfer the proceeds, an auction house could foreseeably see a reduction of 50%, or greater, in net income.

<sup>136</sup> The State has an obvious pecuniary interest in acquiring fine art, including without limitation, acquiring art to be displayed at public museums for increased ticket and tourist revenue.

<sup>137</sup> *RESALE ROYALTIES*, *supra* note 129, at 23 (“This figure represents nearly one fourth of the four hundred artists in total who had received the royalty in the time period from the CRRA’s enactment in 1976 to the 2011 New York Times article cited by the court in *Estate of Graham*. Given the inconsistent application and enforcement of the CRRA, and, until recently, the lack of case law, it is difficult to ascertain the effect the law has had on California’s artists and art market.”) (footnote omitted).

<sup>138</sup> *Id.* (“The Council currently is holding royalties for ninety-eight artists or estates, either because the artist or estate cannot [sic] be located, or due to difficulty in communicating with the artist or their estate. This figure represents nearly one fourth of the four hundred artists in total who had received the royalty in the time period from the CRRA’s enactment in 1976 to the 2011 New York Times article cited by the court in *Estate of Graham*. Given the inconsistent application and enforcement of the CRRA, and, until recently, the lack of case law, it is difficult to ascertain the effect the law has had on California’s artists and art market.”).

<sup>139</sup> *Sam Francis Found.*, 784 F.3d at 1324.

<sup>140</sup> *Droit De Suite*, *supra* note 101, at 155.

ty' theory of intellectual property."<sup>141</sup> Yet while courts may have grappled with the application of moral rights, the economic reality "that the CRRRA has harmed California's art market" was plainly apparent.<sup>142</sup> In Europe, where countries adopting a resale royalty chilled sales of artwork, so too did "Sotheby's . . . cease holding contemporary art auctions in Los Angeles shortly after the royalty was enacted . . ."<sup>143</sup>

With the Supreme Court's recent denial of certiorari, there is hope that a more thoughtful discussion will take place to elucidate the issues of resale royalties and moral rights.<sup>144</sup> Now that the case was remanded to the district court for additional fact-finding, perhaps future jurisprudence will defer to more compelling arguments found in existing authority, such as the Copyright Office's comprehensive report on a resale royalty in 2013, rather than through populist analysis.<sup>145</sup> Once this issue is further contemplated with judicial scrutiny, even the

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<sup>141</sup> Lacey, *supra* note 107 at 1541, 1543 ("The third theory of intellectual property comes primarily from the works of Hegel, who viewed property as 'the embodiment of personality.'"). This would force an American "court's willingness to incorporate the concept of moral rights may hinge on whether the judge accepts the 'personality' theory of intellectual property." *Id.*

<sup>142</sup> *Supra* note 114, at 22 (footnote omitted).

<sup>143</sup> *RESALE ROYALTIES*, *supra* note 129, at 22.

<sup>144</sup> See generally *Sam Francis Found.*, 784 F.3d. The auction houses have reframed their argument in an attempt to strike the statute down in its entirety, now contending that the CRRRA may be preempted by federal copyright law by regulating the same subject area. See Bill Donahue, *Artists Say California Resale Law Not Preempted by Copyright*, LAW360 (Feb. 23, 2016), <http://www.law360.com/articles/762498/artists-say-calif-resale-law-not-preempted-by-copyright>.

<sup>145</sup> See *RESALE ROYALTIES*, *supra* note 129. This argument appears backed by an updated report in 2013, where the United States Copyright Office invited public commentary to revisit the merits of a federally enacted resale royalty. *Id.* Supporters argued that a hierarchy existed within copyright protections, leaving visual artists, by nature of their limited medium, at the bottom of the totem pole. *Id.* Visual artists, they argued, are less protected by copyright laws, and distinguished from "the authors of books, songs, films and other creative works [that] may benefit over and over again selling or licensing multiple copies or repeat programming." *Id.* at 4. Proponents further argue that a federal resale royalty, would not only demonstrate a national commitment to artists, but would counteract this imbalance by providing a built-in welfare for artists otherwise incapable of recognizing these record-breaking sales. *Id.* However, this Note stipulates that the auction houses will argue the belief that other art mediums, like music or film, are afforded greater copyright protections and commercial possibilities is built from a presumptuous foundation. In music, for example, the "original" recording is afforded unique copyright protection separate from the melody and lyrics. 17 U.S.C. § 106 (2012). Securing the copyright to the original recording, therefore, requires paying for an additional copyright, hence why Hollywood's more shrewd producers tend to utilize live or cover band renditions instead. Moreover, despite arguments to the contrary, visual artists are indeed capable of licensing their original work, or for that matter, reproducing the original to sell multiple copies as evidenced by the variety of artists licensing their original works for limited screen prints, bedroom posters, album art covers, or even in the background of TV and film. Furthermore, a musician, author, or filmmaker's decision to mass-produce the original work necessarily dilutes the value of the original work, as the amount consumers may be willing to pay to own, or more recently lease, a given song, book, or movie differs drastically based on the available supply. In fact, some musicians have chosen to voluntarily limit the supply of their original work by distributing finite amounts of

Ninth Circuit will be forced to conclude that “the resale royalty concept fits awkwardly within a free market economy.”<sup>146</sup>

#### IV. TEACHING AN ARTIST TO FISH<sup>147</sup>

The single biggest challenge facing the judiciary today is answering the question, “what is ‘art?’” Previous attempts by the judiciary to probe metaphysical realms have often resulted in laws with enormous margins for abuse. Take, for example, the ongoing difficulty with regulating religion. The noble humanitarian efforts of correcting injustices—say, allowing prisoners of Jewish faith to wear yarmulkes in prison as an exception to the strictly enforced gang attire dress code—can quickly present inconsistencies when trying to define religion, religious practices, or the treatment of religious organizations and their followers.<sup>148</sup> A court’s reasoning behind acceptance of the Church of Scientology but not the Church of the Filet Mignon<sup>149</sup> becomes grounded more in social familiarity than reason.<sup>150</sup> This poses a foreseeable problem in art and collectibles, where sincerity is subjective and entire genres have been built on irreverent rejection of established norms.<sup>151</sup> The Supreme Court’s longstanding reticence on

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copies and even auctioning the original one-of-a-kind work through auction houses to increase, not decrease, their take-home profit. See Bob Van Voris, *Artist Sues Martin Shkreli and RZA Over \$2 Million Wu-Tang Clan Album*, BLOOMBERG (Feb. 9, 2016), <http://www.bloomberg.com/news/article/2016-02-09/martin-shkreli-s-wu-tang-album-violates-copyright-artist-says> (Rap group Wu Tang Clan sold a single copy of an album for more than \$2 Million as a unique collectible through online auctioneer Paddle8).

<sup>146</sup> *Droit De Suite*, *supra* note 101, at 147.

<sup>147</sup> “The old adage about giving a man a fish versus teaching him how to fish has been updated by a reader: Give a man a fish and he will ask for tartar sauce and French fries! Moreover, some politician who wants his vote will declare all these things to be among his ‘basic rights.’” THOMAS SOWELL, *THE THOMAS SOWELL READER* 397 (Basic Books, 2011).

<sup>148</sup> Demonstrating valid religious beliefs in courts turned on societal familiarity, sincerity, and intent, while challenging a religious belief required a compelling interest, such as protection of citizens’ health or safety, to permit a restriction on the free exercise of religion.

<sup>149</sup> The Church of the Filet Mignon, a religion created within prison, infamously filed a lawsuit for the state’s denial of “three steaks and three glasses of wine” as part of their daily “religious practices.” See Philip Parker, *Texas House Endorses Religious Freedom Bill*, LUBBOCK AVALANCHE-J. (May 18, 1999), [http://lubbockonline.com/stories/051899/rel\\_051899052.shtml#.VwXY\\_JaAOko](http://lubbockonline.com/stories/051899/rel_051899052.shtml#.VwXY_JaAOko).

<sup>150</sup> The Church of Scientology remains an ongoing locus of litigation, challenging traditional notions of accepted religious exemptions particularly with respect to real estate and tax treatment. See generally *Church of Scientology of California v. C.I.R.*, 823 F.2d 1310, 1320 (9th Cir. 1987). In its support, the Church of Scientology contended that it has been unfairly profiled by the IRS, citing to a longstanding tradition of litigation over its allegedly legitimate religious practices. See *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1148 (D.C. Cir. 1969) (affirming the IRS seizure of E-meters on the basis of “false or misleading labeling” as a potentially legitimate agency concern).

<sup>151</sup> Adler, *supra* note 15, at 1549 n.207 (“Even relying on an ‘institutional’ theory of art that

the subject would be forcibly broken, bestowing the unenviable task of defining “artist” or, for that matter, “art” to the current administration.<sup>152</sup> The individual palate of a particular court curmudgeon would therefore provide the final say in what constitutes art, potentially invalidating less traditional works of art, echoing embarrassing reasoning no more sound than the standard of “I know it when I see it.”<sup>153</sup> Even the art community is challenged by the concept of art, and is, at times, unable to make simple binary distinctions of art from non-art.<sup>154</sup> Whether classifying the works of Frank Lloyd Wright or Sam Francis, the slippery ambiguity of defining art has no place in the courts.<sup>155</sup> As with the Church of Filet Mignon, the court must consider the implications of defining art to enforce a resale royalty act and the precedence it sets. The notion that in one context an architect might be heralded as an artist and, in another, a mere carpenter, is too vague an area to be articulated by the courts. The precedential concept of a resale royalty—where a creator, simply by virtue of being a creator, is entitled

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defines ‘art’ as whatever the ‘art world’ says is art would be under-inclusive.”).

<sup>152</sup> See *id.* (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)) (“Relying solely on critical acceptance or opinions to define art will inevitably chill the work of unpopular and unrecognized artists, the very people who may be most likely to change the course of art. As the Court has observed in its First Amendment decisions, it is essential to protect speech from the ‘prevailing climate of opinion.’”); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946) (“[W]hat is good art, varies with individuals as it does from one generation to another.”).

<sup>153</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Are we to allow the same margin of judicial subjectivity into the courthouse in defining art and collectibles? The precedential ambiguity of an “I know it when I see it” standard inserted into art and collectibles is precisely the type of unnecessary judicial interference in the market that the Court is meant to avoid.

<sup>154</sup> Particularly in today’s increasingly accepting climate of certain post-modern artistic endeavors, insiders appear just as perplexed as to the current state of contemporary art. In 2015, an innocent woman was stabbed with an X-Acto knife during Art Basel in Miami as some onlookers were unable to discern whether it was a performance art piece. See Sarah Cascone, *Chaos as Woman Brutally Stabbed at Art Basel in Miami Beach*, ARTNET NEWS (Dec. 5, 2015), <https://news.artnet.com/art-world/chaos-woman-brutally-stabbed-art-basel-miami-beach-386204>; see also Adler, *supra* note 15, at 1507 n.28 (“[C]ritical acceptance is a sufficient reason to call a work ‘art,’ but not a necessary one; works currently not accepted by the ‘art’ world nonetheless may be ‘art.’ Ultimately, I believe the word ‘art’ defies definition because ‘art’ may be that which contests the meaning of ‘art.’”).

<sup>155</sup> Frank Lloyd Wright is widely recognized as both an architect and artist. Arguably, his most critically acclaimed piece, *Fallingwater*, introduced an innovative architectural achievement that blurred the lines between functional architecture, art, sculpture, and nature. See generally FALLINGWATER, *What is Fallingwater?*, <http://www.fallingwater.org/37/what-is-fallingwater> (last visited May 4, 2017). When taken in its entirety, the lot is considered a piece of art, praised for its ability to incorporate naturally occurring objects, such as a waterfall, into an artistic work. This begs the question: to what extent, if any, should Wright be afforded artistic protection? If we are to consider the entire lot an artistic work, then, under copyright law, Wright is similarly afforded protection to the individual portions. After all, a musician has a protected interest in both parts as well as the sum of its parts. On the backs of this precedence, would Wright be afforded similar artistic protection over the individual features of the lot? To the property’s improvements and fixtures? To the sculpture separate from the lot? To the naturally occurring waterfall?

to equity in his or her creation in perpetuity—leaves the door open for corruption in other commercial settings.<sup>156</sup> “For the law courts to decide ‘What is Beauty’ is a novelty even by today’s standards.”<sup>157</sup>

As a result, the inherently abstract marketplace presents an enormous, perhaps impossible, challenge to the judiciary. Even without integrating moral rights or foreign intellectual property considerations, our existing legal definition of art highlights an ineffective scattershot attempt ripe for abuse. Guidance may come from contract law, where the adoption of a resale royalty would address a perception that artists are inevitably of such inferior bargaining positions as to automatically render the terms of a transaction for the sale of their work unconscionable.<sup>158</sup> Yet, a contractual lens proves troublesome in resolving the perceived deficiencies in the unpredictably volatile art and collectibles market, as “an injunction setting a defendant’s prices would substitute a court or agency’s judgment for the workings of the market.”<sup>159</sup> Accordingly, in a market predicated on unconscionable transactions,<sup>160</sup> the courts felt compelled to add layer upon layer of prophylaxis, until ultimately arriving at a shortsighted redistributionist solution with the resale royalty.

Courts have been similarly influenced by principles in both real property and tax, as notable private collections—the Frick, the Getty, and the Isabella Stewart Gardner Museum—all sought “educational” qualification as a non-profit.<sup>161</sup> More notably, art and collectibles are expressly included within the established tax deference strategy of a Section 1031 exchange.<sup>162</sup> The influx of

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<sup>156</sup> Imagining a resale royalty in other commercial settings further illustrates the objective absurdity that would plague such precedent. In a corporate setting, the notions of equity and shareholder ownership would be undermined if founders of business were able to claim an equity stake in perpetuity simply by virtue of being the founder. Likewise, in real estate, would the estate of an architect be entitled to claim a portion of the proceeds on a condominium complex each time a unit is sold?

<sup>157</sup> *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring).

<sup>158</sup> In short, an unconscionable contract occurs when the terms are so overwhelmingly one-sided as to favor the party who has superior bargaining power and to betray good conscience. See Uniform Commercial Code § 2-302 (2016). Accordingly, since no reasonable or informed person would otherwise agree to it, an unconscionable contract is held to be unenforceable. *Id.*

<sup>159</sup> D.O.J., *supra* note 21, at 41.

<sup>160</sup> That is not to say that no unconscionable scenario may apply. Through surreptitious dealing, for instance, a widower in need of funeral funding might unknowingly part with a valuable Van Gogh to a fully informed gallery owner, creating an unconscionable contract. However, courts’ applications would now apply this blanket policy to every transaction. That is, when an art investor “sees something” in an unknown artist’s painting and acquires the piece, in a later sale for a premium, courts would effectively penalize the investor’s instincts and purchasing risk because the artist underestimated the value of his own work.

<sup>161</sup> See Rocco, *supra* note 61, at 24.

<sup>162</sup> See Federation of Exchange Accommodators, *White House—Treasury*, § 1031 TAX

sophisticated investors has—for better or worse—equated transacting for the sale of art to that of any other commodity, and courts should be persuaded more heavily by this existing legal precedence.<sup>163</sup> The tax code accurately reflects the changing patrons of auction houses, requiring proof “that he or she is an investor in art, not just a collector, and that the principal reason for owning the art is to earn a profit rather than personal enjoyment.”<sup>164</sup> Focusing on the consumers rather than the commodity, the IRS effectively circumvents the issue of defining art in a collector’s favor, and the limited forays of qualifying art for the purposes of “like-kind” exchanges only serve as a caution to courts of the inherent case-by-case issues.<sup>165</sup>

With the latest remanding of the CRRRA, the disruptive concept of American moral rights, at present, appears to be momentarily silenced. This judicial reservation, in reaction to the frenetic energy of the speculative bubble, is perhaps the best response. Regulating the excited market through resale royalties or moral rights requires courts to travel down a definitional rabbit hole of what constitutes art and who is an artist. Yet rather than requiring a court “to assume

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REFORM (Feb. 1, 2016), <http://www.1031taxreform.com/legislation/treasury/>. Art and collectibles are expressly categorized within the long-term capital gains tax structure at a 28% rate. 26 U.S.C. § 1(h)(4) (2012). However, a 1031 exchange allows art investors to postpone capital-gains taxes if proceeds from the sale are used to purchase like kind property within 180 days. Federation of Exchange Accommodators, *White House—Treasury*, § 1031 TAX REFORM (Feb. 1, 2016), <http://www.1031taxreform.com/legislation/treasury>. Collectibles, including art, are defined in section 408(m) of the tax code, including any work of art, rug or antique, metal or gem, stamp or coin, alcoholic beverage, or other tangible personal property specified by the Secretary. See 26 U.S.C. § 408(m)(2)(A)–(F) (2016).

<sup>163</sup> See Federation of Exchange Accommodators, *supra* note 162. President Obama’s 2016 Budgetary Proposal sought to specifically modify 1031 exchanges to exclude art and collectibles from non-recognition treatment. *Id.*

<sup>164</sup> Daniel Grant, *With 1031 Exchanges, Art Investors Avoid Taxes*, WALL ST. J. (Feb. 1, 2015), <http://www.wsj.com/articles/1031-exchanges-help-art-investors-avoid-taxes-1422849602> (“Experts say the IRS looks more favorably on those desiring investor status when they maintain records of purchases and expenses, seek the advice of art experts, have artworks appraised periodically, obtain insurance for the art and present themselves in the industry as an art investor.”). *Id.*

<sup>165</sup> *Id.*

(“What constitutes ‘like-kind’ isn’t spelled out in IRS regulations. It is not clear, for example, that a lithographic print couldn’t be exchanged for an oil painting, or even a painting for a sculpture. Still, says Mr. Levine, ‘most practitioners believe that exchanging a sculpture for a painting as part of a 1031 is very risky.’ As Louis Weller, a lawyer with Bryan Cave in San Francisco, says, ‘the scope of the “like-kind” requirement as it applies to art is wholly unexplored territory from a technical tax perspective.’”).

However, while persuasive authority on the topic is lacking, the IRS provided some guidance in 1981 when it refused to qualify a lithograph as like kind with an oil painting. See Private Letter Ruling 8127089 (1981) (ruling that replacing lithographs destroyed by fire with new lithographs requires “similar or related in service or use” to the property destroyed.).

the day-to-day controls characteristic of a regulatory agency,”<sup>166</sup> perhaps the most prudent approach is to allow the auction house patrons and art community to concern themselves with the academic debates over what defines art or which moral rights may be endowed to an artist. In so doing, the United States can lead the charge in allowing the “inequality in auction prices [to] reach some natural limit.”<sup>167</sup> Art and collectibles are an unquestionably important cultural and uniquely human phenomenon,<sup>168</sup> but thus far, the economic realities of well-intended interventionism have only reduced the overall sale of artworks. As the sale of art and collectibles becomes evermore promiscuous, perhaps the safest prophylaxis is simply judiciary abstinence.

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<sup>166</sup> Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989).

<sup>167</sup> See De Aenlle, *supra* note 58.

<sup>168</sup> Goldman, *supra* note 14 (“The question of what constitutes art, of what qualifies as creativity, is something that human culture has grappled with for generations.”). Although some creative behavior has been discovered in the mating behaviors of animals, l’art pour l’art or art for art’s sake, appears to exist only among humanity. *Id.* (“One study in 2011 found that people are surprisingly good at spotting the difference between professional art and the works done by chimps and elephants, and they preferred the human paintings.”).